

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CHELAN COUNTY DEPARTMENT
OF PUBLIC WORKS

Appellant,

y.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY

PCHB No. 86-223

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER, the appeal from Department of Ecology Notice of Penalty No. DE 86-C257 for \$750 came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman and presiding, and Members Wick Dufford and Judith A. Bendor, at a formal hearing in Wenatchee, Washington, on March 23, 1987.

Appellant appeared by Deputy Prosecuting Attorney, Mark Davis. Respondent appeared by Allen T. Miller, Jr., Assistant Attorney General. Reporter Betty Koharski recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

Appellant Chelan County owns and maintains the Sleepy Hollow bridge over the Wenatchee River, at a point about 2 1/2 miles upstream of the river's confluence with the Columbia River.

II

Respondent Department of Ecology (DOE) is a state agency charged with the administration and enforcement of the State's Water Pollution Control law, chapter 90.48 RCW.

III

The waters of the Wenatchee River at Sleepy Hollow bridge are Class "A" for purposes of the state's water quality standards. The turbidity standard, applicable when such waters are generally clear, is 5 NTU (nephelometric turbidity units) over background.

IV

On September 11, 1986, at approximately 8:15 a.m. an employee of the Department of Fisheries (DOF) observed a Chelan County Public Works front-end loader sitting on a gravel bar on the right bank of the Wenatchee River at the Sleepy Hollow bridge. The employee observed that tracks from the front-end loader led into the water. There was a turbid plume of water 200 yards long and several yards wide, plainly visible in an otherwise clear stream downstream of the machine in the Wenatchee River.

After spending 15 minutes at the site taking pictures and speaking to the equipment operator, the DOF employee left and reported his observations to his supervisor. DOF then relayed the information to DOE's Central Regional Office.

V

The county had not applied for a water quality standards modification for the Wenatchee River in conjunction with this maintenance work on Sleepy Hollow bridge. A similar situation involving Chelan County Public Works occurred earlier in 1986 when DOE issued a Notice of Violation (No. DE 86-221) to Chelan County for not obtaining a water quality standards modification for the Wenatchee river prior to maintenance work on the Mission Creek Bridge. After issuance of this earlier Notice, DOE met with the County and explained the water quality standard modification requirement and the application process. Based on the discussions it was DOE's view that the County understood the procedure. The Notice was withdrawn and no penalty was assessed.

VI

The clear appearance of the river generally on September 11, 1986, when observed by the DOF employee, is indicative of background turbidity well below 50 NTU. Under such circumstances the observance of a marked, plainly discernible turbidity plume demonstrates a change of greater than 5 NTU over background. The addition of only 5 NTU to clear water is difficult to discern with the naked eye.

VII

On October 14, 1986, DOE issued Notice of Penalty incurred and due No. DE 86-C257. This penalty in pertinent part provided:

Notice is hereby given that you have incurred, and there is now due from you, a penalty in the amount of \$750 under the provisions of RCW 90.48.144.

The Chelan County Department of Public Works initiated repairs on the Sleepy Hollow Bridge on September 11, 1986. The initiation of this work necessitated the entry of heavy equipment into the Wenatchee River resulting in violations of the State of Washington's Water Quality Standards for Class A waters and constituted violations of RCW 90.48.080.

VIII

On October 17, 1986, Chelan County applied to the Department of Ecology for a relief from the penalty. On November 14, 1986, the Department of Ecology denied relief.

Feeling aggrieved by this decision appellant appealed to this Board on December 12, 1986.

IX

From the appearance of the site, DOF's employee, when he made his observations, thought that heavy equipment had been operated in the water, causing the turbidity he observed and probably causing muddy conditions on prior occasions. The evidence presented does not convince us that this was the case.

X

The cause of the turbidity observed by the DOF employee was not an ongoing operation working within the wetted perimeter of the stream. Rather it was a one-time occurrence which took place about 8:00 a.m. on the morning of September 11. At that time, the equipment operator, starting up for the day, dropped the bucket of the front loader near the river and backed up. This broke the berm at that point, released water which had come in behind it, and caused a turbid plume to flow out into the main river channel.

XI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Finding of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these matters and these parties. Chapter 90.48 RCW, Chapter 43.21B RCW.

II

RCW 90.48.080 states:

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the (DOE), as provided in this chapter.

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III

The pertinent water quality standard is set forth in WAC 173-201-045(2)(vi) which reads:

Turbidity shall not exceed 5 NTU over background turbidity when the background is 50 NTU or less, or have more than a ten percent increase in turbidity when the background turbidity is more than 50 NTU.

This standard reflects the determination of DOE as to what constitutes pollution. RCW 90.48.035. City of Centralia v. Department of Ecology, PCHB No. 84-287 (1985).

IV

Appellants violated RCW 90.48.080 by causing a discharge into waters of the state which violated the water quality standard for turbidity in Class "A" waters.

V

RCW 90.48.144 authorizes the issuance of a penalty for the violation of RCW 90.48.080 of "up to ten thousand dollars a day for every such violation". The statutory ceiling on this penalty was raised as recently as 1985, reflecting a legislative intent to treat actions contravening the water pollution control statute with increased seriousness. Section 2, Chapter 316, Laws of 1985.

VI

However, the principal aim of civil penalties is to influence behavior - to deter violations and to secure compliance both in the specific instance and generally.

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On this record, the violation is not egregious and the appellant appears to be making efforts to comply in the future. We believe the County is sincerely committed to meeting the water quality standards and did not think, in this case, that the work would require a short-term modification of these standards. Hereafter, when working a project near the river, we believe prudence would dictate applying for a temporary water quality modification to provide against the unexpected. In light of all the facts and circumstances we conclude that the penalty should be modified, as reflected in following order.

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

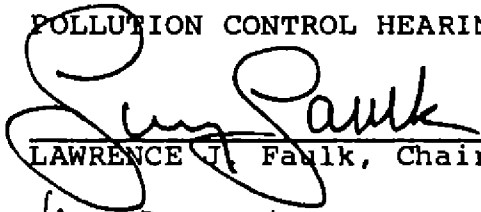
From these Conclusions the Board enters this


ORDER

Department of Ecology Notice of Penalty Incurred and Due No.
DE 86-C257 is affirmed as to the violation asserted. The penalty,
however, is abated to \$375 and affirmed in that amount.

DATED this 20th day of August, 1987.

POLLUTION CONTROL HEARINGS BOARD


LAWRENCE J. Faulk, Chairman


WICK DUFFORD, Member


JUDITH BENDOR, Member

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